No. 15344

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TSEUNG CHU, also known as Bow Quong Chew, also known as Tseung Bowquong Chew, also known as Thomas Bowquong Chew,

Appellant,

vs.

GORDON L. CORNELL, Acting Officer in Charge of United States Department of Justice, Immigration and Naturalization Service at Los Angeles, California,

Appellee.

REPLY BRIEF OF APPELLANT.

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ARGUMENT.

I.

The Crime of Which Appellant Was Convicted, Wilful Attempts to Evade and Defeat the Income Tax in Violation of Title 26, United States Code, Section 145(b), Does Not Constitute a Crime Involving Moral Turpitude Within the Meaning of Section 212(a)(9) of the Immigration and Nationality Act.

A. The Crime of Wilfully Attempting to Evade or Defeat Income Tax in Its Inherent Nature Does Not Involve Moral Turpitude.

Appellee in his brief asserts that the crime of wilfully attempting to evade or defeat income tax in violation of

Title 26, U. S. C., Section 145(b) (Int. Rev. Code of 1939), 53 Stat. 62, in its inherent nature involves moral turpitude. In support of his position appellee cites the decision in *Chanan Din Khan v. Barber* (N. D. Cal., 1957), 147 Fed. Supp. 771, and appellee urges that the case of *Jordan v. De George* (1951), 341 U. S. 223, 71 S. Ct. 703, 95 L. Ed. 886, supports the decision in *Chanan Din Khan v. Barber, supra,* as well as appellee's position in the case here at bar.

It is respectfully urged that the decision of the District Court in the case of *Chanan Din Khan v. Barber, supra,* is in error and that the crime of wilfully attempting to evade or defeat income tax does not in its inherent nature involve moral turpitude. (*Twentieth Century-Fox Film Corporation v. Lardner* (C. C. A. 9th, 1954), 216 F. 2d 844, 852.) It is respectfully urged that the decision in *Jordan v. De George, supra,* does not support the decision in the case of *Chanan Din Khan v. Barber,* nor does it support the position of appellee on this appeal, for the Supreme Court stated, as reported at page 232 of the official opinion in *Jordan v. De George:* "Fraud is the touchstone by which this case should be judged."

While appellee contends (Br. p. 8) that the case of *United States v. Scharton* (1932), 285 U. S. 518, 52 S. Ct. 416, 76 L. Ed. 917, does not hold that an intent to defraud is not a necessary element of Section 145(b) of Title 26, U. S. C., appellant respectfully urges that a careful reading of the decision in the *Scharton* case definitely establishes that an intent to defraud is not an element of the crime of evading or defeating income tax, and that the Court therein expressly holds that an intent to defraud the Government if alleged in an indictment charging a violation of Title 26, U. S. C., Section

145(b), would be surplusage "for it would be sufficient to plead and prove a wilful attempt to evade or defeat." (*United States v. Scharton, supra,* at pp. 518, 521; also see *United States v. Noveck,* 271 U. S. 201, 203, 46 S. Ct. 476, 70 L. Ed. 904, 905.)

The case of *Berra v. United States* (1956), 351 U. S. 131, 76 S. Ct. 685, 100 L. Ed. 1013, referred to in a footnote to the decision in *Chanan Din Khan v. Barber, supra,* does not in any way change the rule set forth in the cases of *United States v. Scharton, supra,* and *United States v. Noveck, supra.* Appellant respectfully submits that the language of the Supreme Court in the case of *Berra v. United States,* found at page 134 of the official opinion, was referring only to the facts in that particular case when the Court stated,

> *"for here the method of evasion charged was the filing of a false return,* and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return [Section 145(b)] were identical with those required to prove that he delivered a false return with 'intent' to evade taxes [Section 3616(a)]. *In this instance* Sections 145(b) and 3616(a) covered precisely the same ground." (Italics ours.)

The italicized portions of the quotation from the opinion of the Supreme Court in the *Berra* case, it is respectfully submitted, clearly make it evident that the Court was merely referring to the facts in the case there at bar. Appellee has fallen into a misapprehension of the inherent nature of the statute which is Title 26, U. S. C., Section 145(b) (1939 Int. Rev. Code). The cases cited in the case of *Chanan Din Khan v. Barber, supra,* and referred to on page 6 of appellee's brief herein, and which are concerned with instructions to the jury or sufficiency of

evidence to convict in prosecutions for defeating or evading income tax, are concerned only with a particular method used by the defendant or defendants involved to defeat or evade income tax, to wit, the filing of false and fraudulent income tax returns.

Congress did not define or limit the methods by which a wilful attempt to evade or defeat might be accomplished but provided that it might be accomplished "in any manner." (See *Spies v. United States,* 317 U. S. 492, 499, 63 S. Ct. 364, 87 L. Ed. 418.)

The inherent nature of the crime of wliful attempt to evade or defeat income tax is the doing by a taxpayer of an affirmative act with a bad purpose or evil motive, that is to say, with the purpose or motive of evading or defeating income tax. (See *Spies v. United States, supra,* and *Bateman v. United States* (C. C. A. 9, 1954), 212 F. 2d 61, 69.)

In order to arrive at the conclusion that the crime of wilful attempt to evade or defeat income tax involves moral turpitude one would have to go outside of the statutory provisions defining such crime; this cannot be done in a deportation proceeding. (*United States ex rel. Giglio v. Neelly* (C. C. A. 7, 1953), 208 F. 2d 337, 340.) Neither the Immigration officials nor the courts may consider the circumstances under which the crime was in fact committed when by its definition such crime does not necessarily involve moral turpitude. (*United States ex rel. Giglio v. Neelly, supra.*)

Appellee in his brief contends that the Supreme Court in its decision in the case of *Jordan v. De George, supra,* apparently placed its stamp of approval upon a state court decision, *i.e., Louisiana State Bar Association v. Steiner* (1944), 204 La. 1073, 1084, 16 So. 2d 843. The latter

case was concerned with a disbarment proceeding based upon a wilful evasion of Federal income taxes. While it is true that a footnote to the decision of the Supreme Court in the case of *Jordan v. De George, supra,* does include the statement found at page 8 of appellee's brief to the effect that the Louisiana Court there "specifically held that the wilful evasion of income taxes constitutes moral turpitude," it is respectfully submitted that a careful reading of the Louisiana Court's decision in the case just mentioned discloses that the Court referred to an earlier case of *Louisiana State Bar Association v. Connolly,* 201 La. 342, 9 So. 2d 582, 592, and stated that its holding in the *Connolly* case was to the effect that "the question whether the commission of the felony for which the attorney was convicted constitutes misconduct will be considered upon the merits of the case." In other words, the true effect of the *Steiner* decision, which at page 1084 of the officially reported opinion follows the rule of the *Connolly* case, is that the Court will consider the merits of a wilful evasion of income tax to determine whether or not in the particular instance there was gross misconduct. Furthermore, as pointed out in the *Steiner* decision, the conviction of an attorney at law of *any* felony may be grounds for disbarment of such attorney, so that the felony does not have to be one which by its inherent nature involves moral turpitude.

In a deportation proceeding neither the Immigration officials nor the courts may inquire into the merits of the particular conviction to determine whether or not in the particular case the alien was in fact guilty of moral turpitude. (*United States ex rel. Giglio v. Neelly, supra,* and cases therein cited.) The Louisiana Court decision, it is respectfully urged, has therefore no applicability to the case at bar.

The decision in *In re Hallinan* (1954), 43 Cal. 2d 243, 272 P. 2d 768, which discusses the decision of the Louisiana Court above mentioned, is attacked as not persuasive by appellee in his brief. The decision in the *Hallinan* case was cited with approval by this Court in *Twentieth Century-Fox Film Corp. v. Lardner* (C. C. A. 9, 1954), 216 F. 2d 844, 852.

It is respectfully submitted that the effect of appellee's argument is that the crime of wilful attempt to evade or defeat income tax is a crime involving moral turpitude in that fraud is a necessary element of such offense. Such a position is untenable and is directly contrary to the rule of *United States v. Scharton, supra,* and *United States v. Noveck, supra.* Analogy for the support of appellant's position is found in the case of *United States ex rel. Giglio v. Neelly, supra.* In that case the Court considered whether or not the crime of passing counterfeit coins is a crime involving moral turpitude. To sustain a conviction under the statute considered it was not necessary to prove an intent to defraud inasmuch as such intent was not an element in the statutory provision at the time involved. The Seventh Circuit held that fraud not being an essential element of the crime involved, such crime did not involve moral turpitude regardless of what the particular facts concerned in the passing of counterfeit coins might have been.

B. The Indictment Upon Which Plaintiff Was Convicted Does Not Show Moral Turpitude Within the Meaning of the Deportation Statutes.

Appellee takes the position in his brief that the allegations in the indictment involved in appellant's conviction of income tax evasion assert, in substance, that appellant filed false and fraudulent income tax returns and can be considered to determine whether the crime of which appellant was convicted involves moral turpitude. It is submitted that the authorities cited in appellant's opening brief on this point establish that appellee's position is in error.

Contrary to the position taken by appellee, appellant contends that the case of *United States ex rel. Zaffarano v. Corsi* (C. C. A. 2, 1933), 63 F. 2d 757, does establish that the indictment can be resorted to by the deporting officials and the courts considering the actions of such deporting officials only for the purpose of determining what statutory charge was involved in the conviction upon which the deportation is sought. The crime here involved is the crime of wilful attempt to evade or defeat income tax; the crime is not the wilful attempt to evade or defeat income tax by the filing of false or fraudulent income tax returns. None of the authorities cited by appellee on pages 10-12, inclusive, of his brief support appellee's position, other than the District Court decision in the case of *United States ex rel. Guarino v. Uhl* (S. D. N. Y., 1939), 27 Fed. Supp. 135, and this latter case was reversed by the Second Circuit. Appellee contends that the reversal mentioned was upon other grounds, but appellant submits

that the decision of the Second Circuit Court of Appeals reported in 107 F. 2d 399, 400, is upon the ground that matters in the indictment which are not inherent in the nature of the crime cannot be considered by the deporting officials. The District Court's decision in the *Guarino v. Uhl* case, *supra,* states at page 137 that "the criminal intent admitted by the plea related to a crime for which the burglar's tools, the jimmy, would be adapted and commonly used, burglary or larceny, as stated in the indictment. Both those crimes involve moral turpitude." However, upon appeal the Second Circuit stated that "other circumstances make it highly unlikely that this alien had possession of the jimmy for any such relatively innocent purpose; but that is quite irrelevant. The decisions cited held that the deporting officials may not consider the particular conduct for which the alien has been convicted; and indeed this is a necessary corollary of the doctrine itself." The Second Circuit held in the case just cited that the indictment was satisfied by an intent to commit any crime whatsoever no matter how morally innocent it might be and disregard the language of the indictment quoted in the decision. As appears from the District Court's decision in *Guarino v. Uhl, supra,* the indictment charged the defendant with the crime of "feloniously possessing burglar's instruments," and the District Court stated that the fact that the relator pleaded guilty to a misdemeanor "involved no change in the nature of the offense, but only in the punishment" (*27* Fed. Supp. 135, 136-137).

In the case just cited there was then surplusage in the indictment which could not be considered; and in the case at bar allegations of fraudulent conduct in the indictment are mere surplusage. (*United States v. Scharton, supra.*)

II.

Appellant's Conviction for Violating Title 26, United States Code, Section 145(b), Was Not a Material Fact Which Appellant Was Under a Duty to Disclose in His Application for an Immigration Visa.

Appellee contends that even if the crime of wilful attempt to defeat or evade income tax is not a crime involving moral turpitude, appellant was nevertheless required to reveal his conviction thereof in his application for an immigration visa for the reason that such conviction was a material fact.

Appellant in his opening brief has cited authorities which establish that appellee's contention in this respect is in error. The rule is well stated in the case of *United States ex rel. Teper v. Miller* (D. C. S. D. N. Y., 1949), 87 Fed. Supp. 285, 286:

> "As to the misrepresentations made to the Consul, the law is that the facts misstated must be material to justify a refusal to issue a visa; and that a fact suppressed or misstated is not material to the alien's entry, unless it is one which, if known, would have justified a refusal to issue a visa. U. S. ex rel. Fink v. Reimer, 2 Cir., 1938, 96 F. 2d 217, U. S. ex rel. Leibowitz v. Schlotfeldt, 7 Cir., 1938, 94 F. 2d 263; cf. Daskaloff v. Zurbrick, 6 Cir., 1939, 103 F. 2d 579; U. S. ex rel. Lamp v. Corsi, 2 Cir., 1932, 61 F. 2d 964. The Consul in the instant case would have been justified in refusing to issue the visa only if the suppressed facts were sufficient to cause Teper to be excluded under Section 136(c) of Title 8, U. S. C. A. as a person who had been convicted of a crime involving moral turpitude. Hence the first ground for affirmance of exclusion by the Assistant Commissioner of the Immigration

and Naturalization Service must stand or fall with the second ground, and therefore the only material question before the Court is whether Teper was properly excluded on the ground of having been convicted of a crime involving moral turpitude."

The Board of Immigration Appeals in its Interim Decision No. 763 upon reconsideration on April 16, 1956, in the *Matter of S-C* in deportation proceedings, Docket E-086114, conceded and ruled that a misrepresentation of facts, whether wilful or innocent, made in applying for a visa will not invalidate the visa if the alien would have been eligible to secure the visa had the true facts been known; and in such decision the Board of Immigration Appeals concludes that the rule in *Iorio v. Day* (C. C. A. 2, 1929), 34 F. 2d 920, is the general rule. The Board of Immigration Appeals in the matter just cited further distinguishes the case of *United States ex rel. Jankowski v. Shaughnessy* (C. C. A. 2, 1951), 186 F. 2d 580, upon the grounds that the latter cited case would seem to involve an activity on the part of the alien prior to entry which might cause the alien to be inadmissible to the United States under the Act of October 16, 1918, or Section 3 of the Act of February 5, 1917, "making inadmissible persons who are anarchists, subversives, or believers in sabotage, etc." The decision of the Board of Immigration Appeals just mentioned was approved by the Attorney General of the United States on May 8, 1956.

Counsel for appellant has examined the briefs of counsel in the case of *United States ex rel. Jankowski v. Shaughnessy, supra*, and it appears therefrom that there had been an accusation against the alien there involved to the effect that such alien was a Communist, and the briefs point out that Jankowski was interned in England

prior to the time that Russia was at war with Germany and was released from internment after Russia entered the war; the briefs also show that the alien's family was still resident in Poland and that the alien was able to enter and leave Poland freely after the conclusion of World War II.

Appellant submits that the decision in the case of *Ablett v. Brownell* (U. S. C. A. D. C., 1956), 240 F. 2d 625, cited by appellee, is distinguishable from the case at bar. The alien was under an order of deportation in the *Ablett v. Brownell* case. He had in his application for a visa denied any convictions prior to entry into the United States, whereas he had in fact been convicted of being a landlord "wilfully a party to the continued use of (certain premises) as a brothel" as well as convicted of petty theft. The convictions were in England. The Court of Appeals for the District of Columbia held that the Consul would have been justified in refusing an immediate grant of an immigration visa to Ablett if he had disclosed the brothel conviction, as the Counsul would have had to determine whether moral turpitude was involved in the brothel case. The Court in the cited opinion stated that a final determination as to whether or not such an offense constituted moral turpitude could not have been reached immediately. However, in the case at bar, had appellant disclosed his conviction of the wilful income tax evasion the Consul could have made such determination immediately inasmuch as such crime does not involve moral turpitude. The Court of Appeals for the District of Columbia distinguishes the situation of *Ablett v. Brownell, supra*, from the case of *Iorio v. Day, supra*, and says at page 630 of the cited opinion: "The crime in Iorio, unlike that here, was not one which would immediately raise the question of whether moral

turpitude was involved." Neither the decision of *Iorio v. Day, supra,* nor the decision of *Leibowitz v. Scholtfeldt* (C. A. 7, 1938), 94 F. 2d 263, was questioned in the decision of *Ablett v. Brownell, supra,* or in the decision of *Jankowski v. Shaughnessy, supra.*

Conclusion.

In conclusion it should be pointed out that other points raised by appellee in his brief in opposition to the contentions of appellant have been already answered by the authorities cited in appellant's opening brief. It is respectfully submitted that appellant is not deportable upon either of the two grounds upon which the order of deportation is based: one, that he was not convicted of a crime involving moral turpitude prior to his last entry into the United States; and two, that he was under no obligation to admit the fact of his conviction in his application for a visa. It is further submtted that the phrase "crime involving moral turpitude" does not have a sufficiently definite meaning to afford a constitutional standard for deportation insofar as a conviction under Title 26, U. S. C., Section 145(b), 1939 Revenue Code, is concerned.

Wherefore, it is respectfully submitted that the judgment of the District Court in favor of appellee should be reversed.

Respectfully submitted,

Francis C. Whelan,

Attorney for Appellant.